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# Operation Wātea

Other Legal Issues

Rules of Engagement

Law of Armed Conflict

Legal Brief:



# Scope

- Legal basis for being there
- LOAC refresher
- Nature of the conflict in Afghanistan
- What are ROE
  - ROE this Operation -use of force
  - ROE this Operation – detention, search, Seizure and questioning
  - Detainee handling
  - Scenarios
  - Other legal issues

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# Legal basis for being There

## United Nations Security Council Resolutions

- 1386 (2001) – The First
- 1890 (2009) – The Latest

Military Technical Arrangement (MTA) ISAF and Republic of Afghanistan MTA between GONZ and Islamic Republic of Afghanistan dated 12 August 2009

Exchange of Letters (EOL) NZ and NATO

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# Refresher LAW OF ARMED CONFLICT

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# Types of Conflict

International Armed Conflict

Non International Armed  
Conflict

Violence Less Than Armed  
Conflict

- Internal Disturbances
- Criminal Activity

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# LOAC Principles

## Principle 1: Military Necessity

- You are permitted to use the force required to achieve the military objective



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# LOAC Principles

## Principle 2: Humanity

- Not even armed conflict releases you from basic obligations to other humans
- You must not cause suffering or destruction beyond that necessary to accomplish the mission
- You must not harm people or objects that are not legitimate targets



# LOAC Principles

## Principle 3: Proportionality

- Some rules of LOAC require military necessity to be balanced against humanity



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# LOAC Principles

## Principle 4: Distinction/Identification

- You must distinguish between legitimate military objectives (which can be attacked) and civilian objects (which cannot)
- You must at all times distinguish between the civilian population and combatants
- In this operation, you must distinguish between civilians who are *directly participating in hostilities* and those who are not



# LOAC Principles

## Principle 5: Non-discrimination

- You must not discriminate on the basis of race, colour, religion, wealth, gender and political opinion
- NZDF complies with LOAC even if insurgents do not



# Command Responsibility

○ A commander will be held responsible if he or she:

- Knows or **should know** his or her subordinates are going to commit war crimes and does not prevent them.
- Knows or **should know** his or her subordinates have committed war crimes and does not punish them.

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# Superior Orders

- As a member of the armed forces you must obey lawful orders.
- If you obey a manifestly unlawful order and you commit a crime/ or a war crime the order is not an excuse.

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# Code of Conduct – Slide 1

- Fight only opposing forces or persons taking a direct part in hostilities.
- Attack only **military objectives** and destroy no more than the mission requires.
- When attacking **military objectives** take care to minimise incidental civilian casualties and property damage.
- Respect **civilians** and **civilian property**. Respect cultural property and places of worship.
- Do not fight treacherously by falsely using the protections of the LOAC to harm the opposing force.

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## Code of Conduct – Slide 2

- Collect and care for the wounded and sick, and shipwrecked whether friend or enemy.
- Respect religious, medical, humanitarian and civil defence personnel, transports, buildings and equipment. Respect the dead.
- Respect the use of protective emblems, symbols and markings.
- Uphold LOAC by prevent and reporting violations.

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# What are Rules of Engagement (ROE)

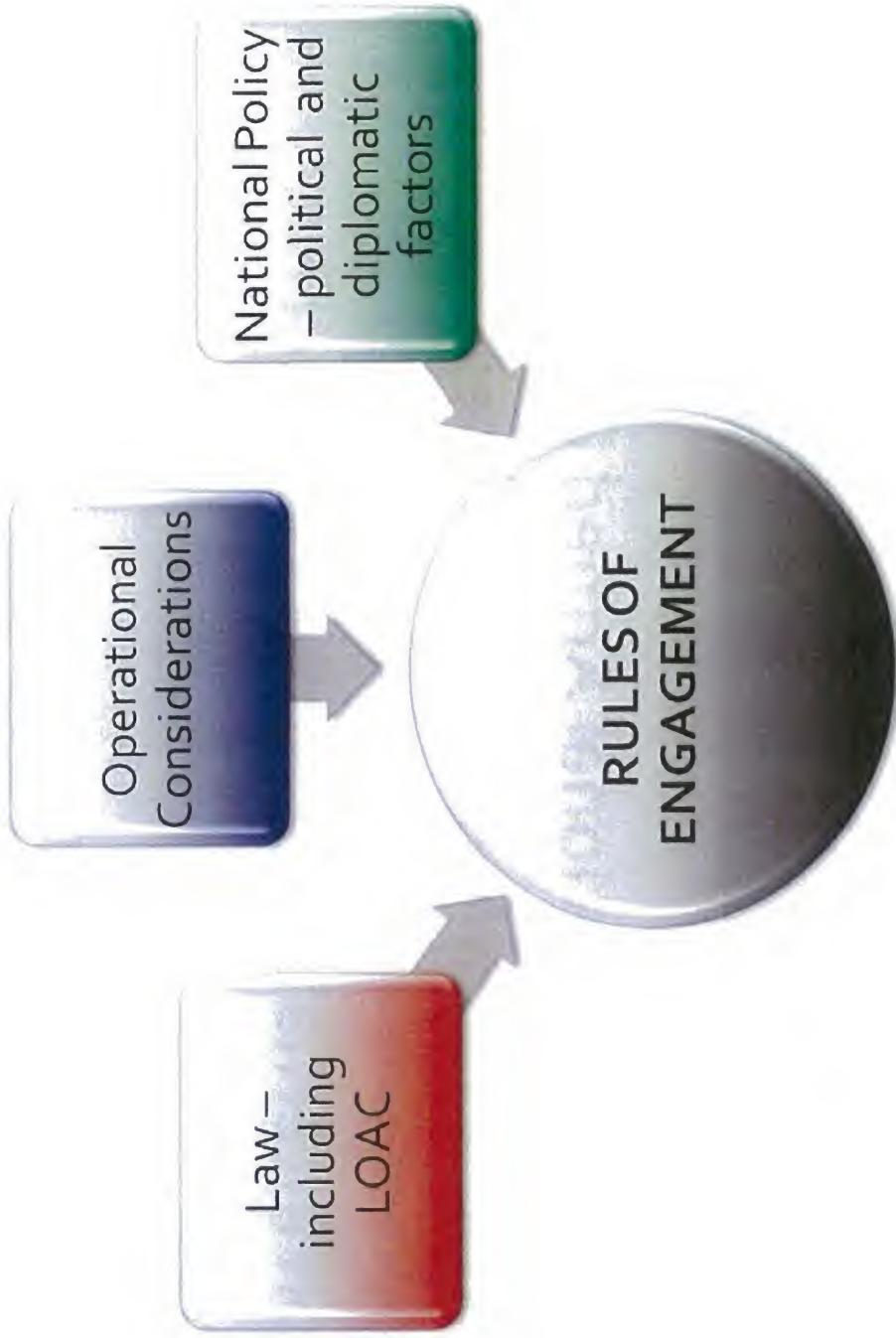
# Rules of Engagement

- Your ROE are orders from CDF and have been approved by the Prime Minister
- Your ROE delineate the circumstances and limitations within which you may use force
- Your ROE do not exceed what LOAC permits
- They must not be interpreted in a way that exceeds LOAC

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# Rules of Engagement



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# Nature of Conflict in Afghanistan

## Not an International Armed Conflict

- What about when coalition forces first started operations in Afghanistan?

## Non International Armed conflict?

- Yes
- Why?  
As well as being a non international armed conflict there is also internal disorder/disturbances and criminal activity going on

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OP WĀTEA

# Rules of Engagement

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# Issues Addressed by Your ROE

- When and against who can force be used
- What degree of force can be used – deadly and less than deadly/minimum force and escalations of force
- Search of persons and property – Who, when, where
- Detention
  - Who
  - When
    - How you treat them whilst detained
    - What you do with them/Hand over

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# Rules of Engagement - General

## OOP WĀTEA

- Different to CONCORD ROE
- Classified – SECRET
- Internal Armed Conflict
- ROE Card – No ROE card
- Detention Card

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# Significant definitions in the ROE

- Hostile act
- Hostile intent
- Designated persons
- Designated property
- Self defence
- Deadly force
- Minimum force

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# Definition– Hostile Act/Intent

- **Hostile act** means the use of force by any person or group against one or more members of TF 81, **designated persons or designated property** where **death or serious injury** is likely to result.
- **Hostile intent** means that there is an imminent intent to commit a **hostile act**. The existence of **hostile intent** may be judged by either:
  - The threatening individual or unit's capability and preparedness to inflict imminent or immediate damage; or
  - Information, particularly intelligence, which indicates an intention to conduct an imminent or immediate attack.

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# Definition- Designated Persons

- Designated persons means:
  - All members of ISAF other than TF 81;
  - All members of the CRU while they are acting in cooperation with ISAF;
  - All members of the ANSF while they are acting in cooperation with ISAF;
  - Any persons designated by either the Commander ISAF (COM ISAF), or Commander ISAF Special Operations Forces (COM ISAF SOF), and approved by the Commander Joint Forces NZ (COMJFNZ); and
  - Any persons designated by COMJFNZ in respect of a national task.

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# Definition– Designated Property

- Designated property means property (including areas) designated by:
  - COMISAF, or COMISAF SOF, and approved by COMJFNZ; or
  - COMJFNZ in respect of a national task.

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## Definition - Self defence

**Self defence** means the use of  
**reasonable force** to protect any  
member of TF 81 or any other  
**designated person** against a  
hostile act or hostile intent.

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## Definition- Deadly force/Minimum Force

**Deadly force** means force that is intended or likely to cause death or serious injury.

**Minimum force** means the minimum degree of force that is *necessary, reasonable and lawful* under the circumstances to achieve the objective. It includes the full range of force, up to and including **deadly force**.

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# Other Important Definitions

- **Incidental casualties** means the unintended death or injury of civilians which occurs incidental to the authorised and legitimate use of force.
  
- **Detention** means the arrest or apprehension of a person and the deprivation of the person's liberty.

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# Use of Force – Individual and Unit Self defence

Use of *minimum force*, up to and including deadly force, is permitted for individual or unit self defence against a hostile act or demonstration of hostile intent

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# Use of Force – Designated Persons

**Use of minimum force, up to and including deadly force, is permitted in defence of designated persons against a hostile act or demonstration of hostile intent.**

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# Use of Force – Designated Property

- Use of minimum force, up to and including deadly force, is permitted in defence of designated property
- Force must still be commensurate to the threat
- Must be qualified by the definition of minimum force which is the force necessary reasonable and lawful in the circumstances to achieve the objective

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# **Use of Force – Direct Participation in Hostilities**

# Direct Participation in Hostilities

- In an internal armed conflict all persons not members of *the State's armed forces* are civilians and entitled to protection against attack unless and for such time as they take a direct part in hostilities (DPH)

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# What does this mean?

- Everyone except members of the armed forces of the Afghan government and coalition force personnel in Afghanistan are **civilians** and have protected status under LOAC, even if they are hostile to Afghan Government
  - Why? Because this is a situation of internal armed conflict - no one can have enemy combatant status during an internal armed conflict
  - **HOWEVER,** civilians lose their protected status for such time as they directly participate in hostilities (DPH)

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# When is a Civilian Directly Participating in Hostilities?

1. Hostile *acts* which are likely to cause actual harm to the personnel and equipment of coalition forces
2. An individual who is a member of an organised armed group that collectively and continuously takes a direct part in hostilities against the legitimate Afghan Government is DPH for the time that the individual is a member

Q.e A member of PSR(S)3

Forces or groups  
that had been  
declared hostile.

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# When does a hostile act start and when does it end?

You are being attacked by a group Afghan civilians with weapons

A group of civilians is postured for and moving into position to attack you

A group of civilians is withdrawing after having attacked you

Someone driving a truck with ammunition to deliver it to an attacking group's position

A member of a group who attacked you is back in his village and engaged in farm work

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# Organised Armed Group

- **PSR(S)3** are organised armed groups involved continuously in combat against the legitimate Afghan Government
  - **PSR(S)3** are directly participating in hostilities (DPH)
    - Attack on them is permitted (ROE <sup>H</sup>)
  - **PSR(S)3** must positively confirm the target is directly participating in hostilities
  - You may not engage if you believe that they are no longer a member of an **PSR(S)3**
  - If you're not sure, you must presume they are protected civilians
  - May not be necessary to attack if they can be arrested

Forces or groups  
that had been  
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# DPH – Summary

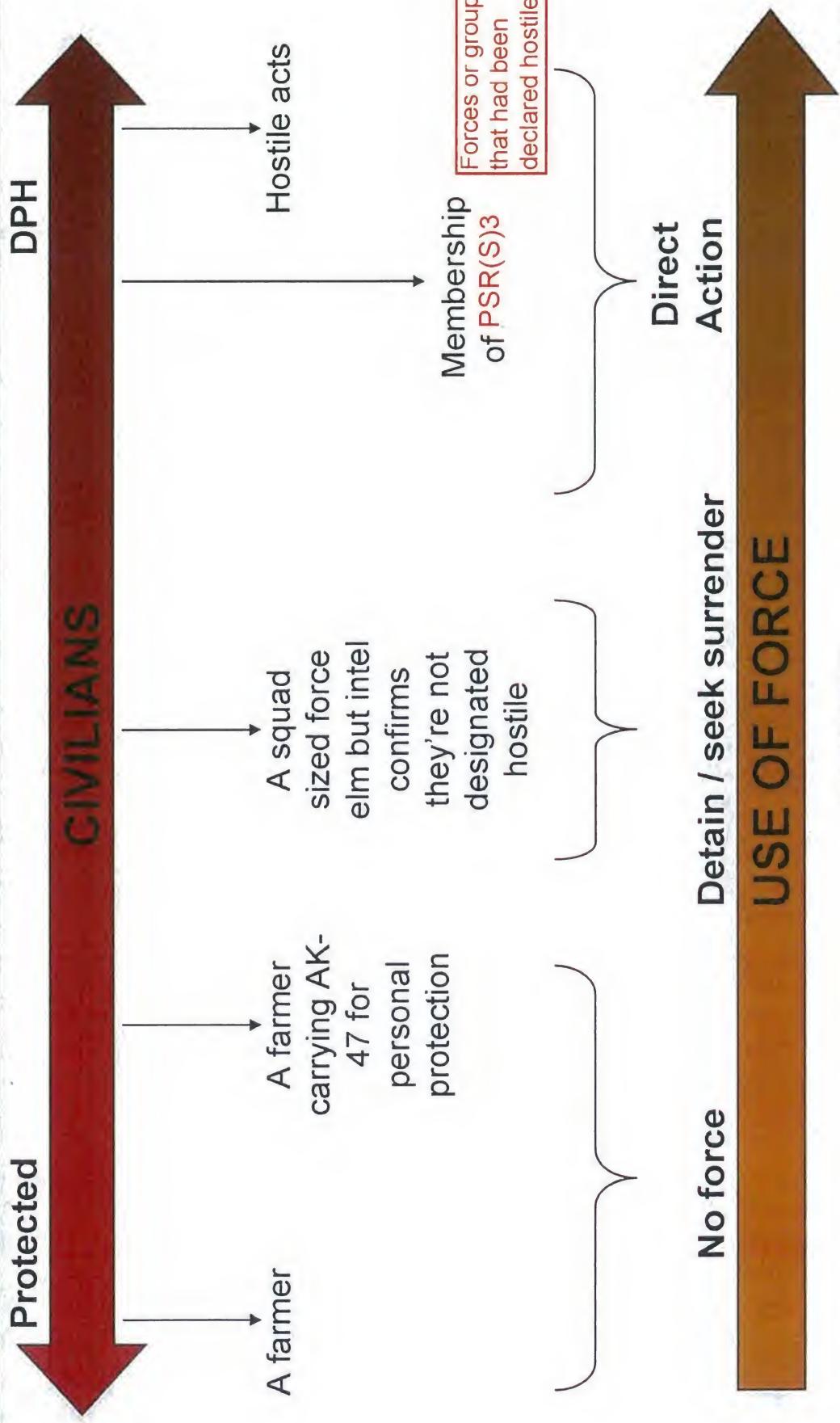
To summarise:

- Persons DPH can be engaged. This includes:
  1. Persons committing hostile acts which are likely to cause actual harm to the personnel and equipment of coalition forces
  2. Persons who have active membership in an organised armed group continuously involved in combat against the Afghan Government (i.e. PSR(S)3 Forces or groups that had been declared hostile)

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# Direct Action – Diagrammatic Summary



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# Other Specific Rules of Engagement

You need to be aware of

# Rules of Engagement

- PSR(S)3 Rule permitting specified category of operations only where essential
  - PSR(S)3 TF 81 personnel were authorised to conduct operations in a particular manner provided they conformed with IHL/LOAC at the appropriate juncture
- Unrestricted carriage of small arms is permitted
  - PSR(S)3 The use of certain devices was permitted
- Unrestricted use of visual illumination is permitted
  - PSR(S)3 TF81 personnel were authorised to conduct systematic observations of various areas, places, persons or things by the use of various means

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# Rules of Engagement

- Observed indirect fire is permitted
  - PSR(S)3
- Rules governing  
use of sensitive  
equipment
- Unrestricted use of non-explosive land  
barriers and obstacles is permitted
  - PSR(S)3
- Rules governing  
use of specified  
non-lethal  
techniques
- PSR(S)3

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# Rules of Engagement

○ PSR(S)3

○ PSR(S)3

Rules controlling  
methods of  
warning

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# Rules of Engagement

- PSR(S)3 TF81 personnel were permitted to use approved weapons systems for authorised purposes
- PSR(S)3 TF81 personnel were authorised to operate within a particular area of operations (AOO). Entry into territory or airspace outside AOO not permitted without requisite approval.
- Identification of targets is accepted if made by visual means or PSR(S)3 other specified objective means

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# Rules of Engagement

- Use of *minimum force*, up to and including deadly force, to achieve the mission is permitted only if CONOPS is lawful
- TF 81 is to comply with LOAC
  - Use of force must to be related to individual or collective self defence, defence of designated persons/property, hostile act, hostile intent or DPH
- LSO will provide advice on lawful force options for a specific mission – particularly DPH

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# Collateral Damage/Incidental Civilian Casualties

Actions which could result in **incidental casualties** and **collateral damage** are permitted if the action is essential for mission accomplishment and the expected **incidental casualties** and **collateral damage** are *proportionate* to the concrete and direct military advantage anticipated

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# Specific Prohibitions

- Cross border operations PSR(S)3

TF81 personnel were authorised to operate within a particular area of operation (AOO). Entry into territory or airspace outside AOO not permitted without requisite approval

- Counter narcotics operations

- PSR(S)3

Rules governing  
use of specified  
non-lethal  
technique

- PSR(S)3

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# Practical Limitations on ROE

Political limitations  
ISAF ROE

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DETENTION  
SEARCH  
SEIZURE OF PROPERTY

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DETENTION

# Rules of Engagement

- *Detention* of a person is permitted if:
  - No member of the CRU or ANSF is present to detain the person; and
  - The person has demonstrated hostile intent, is committing a hostile act, or is interfering with mission accomplishment.

The person must either be released when he or she poses no further threat to the mission or, with the *prior approval of COMJFNZ and CDF*, handed over to an appropriate Afghan authority.

Note specific requirements in ROE for handling those detained – next section of this brief

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# SEARCH AND QUESTIONING

# Rules of Engagement

- *Questioning* of any person who is **detained** is permitted if no member of the **CRU** or **ANSF** is present to conduct the questioning
- *Search* of any person who is **detained** is permitted if no member of the **CRU** or **ANSF** is present to conduct the search

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# SEIZURE OF PROPERTY

# Rules of Engagement

Seizure of any property in the possession of a person who is **detained** is permitted if no member of the CRU or ANSF is present to effect the seizure

Seizure of property permitted if necessary for mission accomplishment

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# DETAINEE HANDLING

# Detainee Handling

- ROE <sup>v</sup> : Detention of a person is permitted if:
  - No member of the CRU or ANSF is present to detain the person; and
  - The person has demonstrated hostile intent, is committing a hostile act, or is interfering with mission accomplishment.
- The person must either be released when he or she poses no further threat to the mission or, with the prior approval of CDF **and** COMJFNZ, handed over to an appropriate Afghan authority.

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# Detainee Handling

## OLoAC requirements

- Common article 3 to the Geneva Conventions – humane treatment
- Treatment
  - Food and water
  - Health and hygiene
- Protection against environment
  - Practise of religion
  - Women and children
  - Medical care

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# Detainee Handling

## ○ Prohibitions:

- Violence to life and person
- Hostages
- Outrages upon personal dignity
- Sentences and executions
- Collective punishment
- Threats

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# Detainee Handling

- ISAF procedures for detainees
  - Handover
  - Search
  - Questioning
  - Release
- Assisting/supporting the CRU and wider ANSF

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# Potential Interoperability Issues – Prohibited Means and Methods

- Anti-personnel mines
- Chemical/biological weapons
  - CS Gas as a method of warfare
    - PSR(S)3  
Rule governing use  
of specified non-  
lethal technique
- Cluster munitions

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# SCENARIOS

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# Scenario 1

- There are 10 civilians located in a hut on the far edge of a small village
- 8 are carrying small arms, 1 carrying HE
- Intel indicates one has **PSR(S)3** connections
- There are an additional 3 armed civilians guarding the hut outside; 2 of which were possibly identified at an **PSR(S)3** trg facility two months ago
- What CONOPS would be permissible?

Forces or groups  
declared hostile

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## Scenario 2

- You are approaching a compound to complete a DDO and you observe a MAM with a rifle on the roof of the compound.
- What do you do?

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## Scenario 3

- You are approaching a target compound and and a MAM with a wpn comes running out, jumps on a motorbike and flees to compound.
- What are your options?

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## Scenario 4

You are heading back from a task and observe a local being badly beaten in the street by a group of youths. As you continue to drive by you observe a rifle being drawn and pointed at the local. What are your options? What do you do?

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## Scenario 5

- There is a group of unarmed men 100m from your position. You know they have been attacking designated persons during the previous two days. They look battle weary, but they seem indifferent to your presence.
- What should you do?

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## Scenario 6

You have set up a VCP

You have place cones out to mark where  
vehicles are to stop

A vehicle approaches the VCP, is signalled to  
stop and does not stop

You can not see inside the vehicle as it has  
tinted windows  
What do you do?

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## Scenario 7

- You are moving to a compound to complete a DDO. INT has revealed that the compound is being used to house INS, and to make IEDs. Further, INT says that the compound has armed guards who will act to protect those inside.
- What are your options?
- What do you do? What are your ROE duties?
  - How is hostile intent relevant?

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# Use of Force in a Nutshell

You can use reasonable force

- Individual self defence
- Unit defence
- Defence of designated persons
- Defence of designated property

Reasonable force can be deadly force if the situation warrants it particularly where the threat is of death or serious injury

Force should be proportionate to the threat

Use degrees of force/graduated force when appropriate

You can attack individuals forces or groups DPH

Why attack when you can arrest

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# Other Legal issues

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# Criminal and Civil Liability

- You are not subject to Afghan criminal law
- You are not liable for damage caused to any Afghan civilian or government property caused by an activity in pursuit of mission
- You are immune from personal arrest and detention  
(By Afghan authorities)
- You remain subject to NZ Law
- The MTA says you will respect the laws of Afghanistan insofar as compatible with mission objectives

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# Respect for Islam

## Handling of Muslim remains

- Non-Muslim must not perform the burial rites for a dead Muslim.
- One must not desecrate the remains by burning or mutilating it.
- One should not allow the remains to be eaten by birds or animals.
- One should not remove the clothes of a Muslim including a Muslim fighter KIA (killed in action).
- The remains must be buried within 72 hours at a maximum.

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# Incident Reporting

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# Inform CDF/Obtain CDF Consent

- CDF is to be informed at the first available opportunity of all incidents relating to:
  - Direct action against suspected insurgents by TF 81
  - The capture of detainees by TF 81 or CRU/ANSF with TF 81 in support
  - No detainee captured by TF 81 may be handed over to any other authority without CDF and COMJFNZ approval

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# What do you do if you observe CRU/ANSF mistreating detainees?

- Any unnecessary/unwarranted violence
- Mentor them away from such conduct
- Report it through your chain of command

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Questions?

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